No. 3--09--0768

Order filed June 6, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

In re DETENTION OF ROBERT A. BURKE,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Iroquois County, Illinois
(The People of the State of Illinois,	)	
Petitioner, Appellee,	)	
v.	)	No. 91--CF--16
Robert A. Burke,	)	
Respondent-Appellant).	)	Honorable William O. Schmidt, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court. Justices McDade and Wright concurred in the judgment.

ORDER

Held: Respondent forfeited his claim that his right to a speedy trial was infringed upon by not raising the issue with the trial court. Moreover, the evidence adduced at trial sufficiently proved beyond a reasonable doubt that respondent is still a sexually dangerous person.

Respondent, Robert A. Burk[1], appeals from an order of the circuit court of Iroquois County denying his application for recovery brought under the Sexually Dangerous Persons Act (the Act). 725 ILCS 205/1.01 (West 1992). Respondent argues that: (1) he was deprived of his constitutional right to a speedy trial; and (2) the court erred in basing its judgment upon a 16-month-old socio-psychiatric report. We affirm.

BACKGROUND

In 1986, the State charged respondent with sexual offenses committed against two nieces and two nephews. All of the victims were under the age of 12; the youngest was 5 years old. Respondent pleaded guilty to two of the offenses, was sentenced to a term of probation, and committed to McFarland Mental Health Center (McFarland). While at McFarland, respondent committed a sexual offense against another patient. On April 2, 1992, respondent was adjudicated a sexually dangerous person and committed to the Department of Corrections. 725 ILCS 205/8 (West 1992) Respondent appealed that adjudication and this court affirmed. *People v. Burk*, No. 3-92-0349 (1993) (unpublished

[1]Respondent signs his name throughout the record as "Burk", however several court documents spell his name as "Burke."

order under Supreme Court Rule 23).

Respondent subsequently filed numerous *pro se* pleadings including several applications alleging recovery pursuant to section 205/9 of the Act. 725 ILCS 205/9 (West 1992). In one such application, this court reversed the judgment of the circuit court for its failure to afford respondent a jury trial. *People v. Burk*, 289 Ill. App. 3d 270 (1997).

At issue in this appeal is the circuit court's latest order denying respondent's most recent application alleging recovery. Respondent addressed a letter to the "Iroquois County Courthouse," dated May 19, 2007, stating "I do not feel I am a risk to your society nor a danger to myself." The circuit clerk date stamped the letter on May 24, 2007, and forwarded copies to the State's Attorney, public defender and presiding judge.

On June 8, 2007, the court made a docket entry indicating it considered the letter of May 24, 2007, to be an application alleging recovery. The court then ordered the director of the Illinois Department of Corrections to prepare and send to the court a socio-psychiatric report for the respondent. The court appointed an attorney to represent the respondent and continued the case until July 25, 2007, for a hearing on the application.

No hearing took place on July 25, 2007. The next docket

entry in the record on appeal is dated January 30, 2009. On that date, the court reaffirmed its decision to consider the letter of May 24, 2007, an application for recovery. The court noted that a defense attorney had been appointed to represent respondent and had been notified of the same on June 8, 2007. The court then continued the case to February 20, 2009, for status.

In the interim between his initial letter and the February 20, 2009, hearing date, respondent wrote several letters to the circuit clerk inquiring as to the status of his case. Also during this time frame, the Illinois Department of Corrections filed a mental health examination of the respondent dated April 28, 2008.

Eventually, the trial court set the case for trial to commence on May 8, 2009. On that date, however, the State's Attorney announced she was not ready to go to trial as she believed the case was only set for status call and not a trial. The court granted the State's request for a continuance as well as respondent's request to have a supplemental socio-psychiatric report prepared given the fact that the April 28, 2008, report was more than a year old. The court directed the Illinois Department of Corrections to provide a current socio-psychiatric report and continued the matter to June 9, 2009, at which time it

hoped to have the new report in hand and choose a hearing date.

At the June 9, 2009, hearing, however, respondent withdrew his request for an updated evaluation then moved to proceed to the hearing without the addendum. Ultimately, the case proceeded to trial on August 14, 2009. At the trial, the State presented one witness, Dr. Mark Carich. Carich is employed by the Illinois Department of Corrections at Big Muddy River Correctional Center and is the supervisor of the treatment staff and the coordinator of the program for sexually dangerous persons. He testified that respondent was placed at the correctional facility at Menard in 1992, transferred to Big Muddy Correctional Center in the fall of 1995, and has been there ever since. While the last socio-psychiatric report completed on respondent was dated March 25, 2008, Carich noted that he "continued to remain familiar with Mr. Burke's treatment since this report was created."

Carich further testified that his main concern about the respondent is that respondent does not think he is a sex offender. He opined the respondent had not demonstrated any skills to reduce his deviancy. Carich indicated that based on the report and "subsequent information [available] regarding his treatment since March 25 of 2008" that respondent continued to minimize his sex offender's status and his past transgressions.

The State specifically asked Carich:

> "Q. And doctor, again since that report was written back on March 25, 2008, you believe that the concern is still in place today at the date of this hearing based on your reviewing treatment of Mr. Burk.?
>
> A. Yes."

When asked whether there has been any progress made in respondent's condition since March 25, 2008, Carich answered that he did not think the progress was significant enough for respondent to no longer be considered dangerous. Carich reviewed many factors and criteria used when evaluating respondent, including: motivation and commitment to recovery; personal responsibility and disowning behaviors; social and affective dimensions; social interest; victim empathy and remorse; assault cycle and relapse intervention skills; and developmental/motivational factors. Based on these criteria and other factors, Carich diagnosed respondent with pedophilia and stated, "dynamically, he hasn't changed significantly enough to alter the propensity to offend." In Carich's opinion, respondent "is still sexually dangerous."

On cross-examination, Carich discussed an interim evaluation

of March 25, 2009. Carich acknowledged that the interim report had no categories marked as "poor." Carich indicated that some of respondent's "other psychiatric difficulties" such as schizophrenia, could be treated by means other than what are provided at Big Muddy Correction Center. On redirect, Carich explained that he believed some of the scores from the interim evaluation "were a bit inflated" and nothing in the evaluation changed Carich's opinion regarding respondent.

After the State rested, respondent testified. Respondent stated the reason for his commitment was because "my niece accused me of having sex with her in some weird form." The following exchange then took place during respondent's direct examination:

> "Q. Did you commit an offense against your niece at that time?"
>
> A. No. The accusation was I fingered her butt or something.
>
> Q. Okay. Did you do that?
>
> A. No. She fell down in the bathroom and I picked her up.
>
> Q. And did you later make an admission to doing this in court?

A. Because the social worker kept badgering me until I said I touched her.

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Q. And how do you believe the treatment is going at McFarland? Have you made progress?

A. Not very much.

Q. Okay. Why do you say that?

A. Because they want to believe that everything you have been accused of or charged with is real based on an accusation.

Q. Okay. What do you believe about your risk to reoffend?

A. I don't believe I'm likely to reoffend.

Q. Why do you say that?

A. Because I didn't offend in '91."

On cross-examination, respondent admitted that he pled guilty to molesting a nephew but claimed he did not actually molest the nephew. He only pled guilty to avoid a 60-year prison term. He also reiterated that he did not molest his niece, he only helped her up in the bathroom.

No other witnesses were presented by either side. The trial

court denied the application for recovery and remanded respondent to the custody of the Department of Corrections. Respondent filed this timely appeal on September 18, 2009.

ANALYSIS

I. Speedy Trial Right

Respondent first argues that he was denied his constitutional right to a speedy trial and, therefore, should be discharged. The ultimate determination of whether a respondent's constitutional speedy trial right has been violated is reviewed *de novo*. *People v. Crane*, 195 Ill. 2d 42, 50 (2001).

While proceedings under the Act are civil in nature, those "subject to the Act must be accorded the same essential protections available to respondents in criminal prosecutions" such as "the right to a speedy trial, the right to confront and cross-examine witnesses testifying against them, and the right against self-incrimination." *People v. Lawton*, 212 Ill. 2d 285, 295 (2004). Respondent only asserts his constitutional right to a speedy trial, and acknowledges that the Illinois speedy trial statute (725 ILCS 5/103-5 (West 2006)) is inapplicable. See *In re Detention of Hughes*, 346 Ill. App. 3d 637 (2004). Respondent, for the first time on appeal, claims his right to a speedy trial was violated, leading the State to claim the issue is forfeited

for failure to raise it below. In a criminal case, to "preserve a claim of error for review, counsel must object to the error at trial and raise the error in a motion for a new trial before the trial court." *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). In a civil case, no posttrial motion is required, but any procedural errors not raised in the trial court are forfeited. See, *e.g. In re Joseph P.*, 406 Ill. App. 3d 341 (2010). We need not decide whether a posttrial motion was necessary since the issue was raised nowhere below. As respondent raised this issue for the first time on appeal, we find the issue forfeited.

We note that respondent does not ask that we review this claim for plain error. Respondent does, however, raise the issue of ineffective assistance of counsel, claiming that his trial counsel was constitutionally ineffective for failing to assert his speedy trial rights below. Respondent failed to make this argument in his initial brief and, as such, the State has had no opportunity to reply to it. Generally, "[p]oints not raised in the defendant's initial brief are forfeited and cannot be raised in the reply brief." *People v. Jacobs*, 405 Ill. App. 3d 210, 218 (2010). In *People v. Thomas*, 116 Ill. 2d 290 (1987), our supreme court noted it "strongly disapprove[d] of counsel's deliberate

disregard for and attempt to circumvent this court's rules" when discussing the issue of ineffective assistance of counsel for the first time in a reply brief. *Thomas*, 116 Ill. 2d at 304; see Supreme Court Rule 341(e)(7), (g) (eff. July 1, 2008). Having not raised the issue of ineffective assistance of counsel until filing his reply brief, respondent has forfeited the issue.

II. Proof Beyond a Reasonable Doubt

Respondent argues that the trial court erred in holding the State proved him to be sexually dangerous beyond a reasonable doubt. Citing to *People v. Vercolio*, 363 Ill. App. 3d 232 (2006), respondent claims we review issues "concerning the recovery of a sexually dangerous person" under the abuse of discretion standard. In *Vercolio*, however, we reviewed specific conditions of an order granting a conditional discharge to a former sexually dangerous person. *Vercolio*, 363 Ill. App. 3d at 236. In *People v. Cole*, 299 Ill. App. 3d 229 (1998), this court held that a "reviewing court will not disturb a trial court's finding that the respondent is a 'sexually dangerous person' unless the evidence is so improbable as to raise a reasonable doubt." *Cole*, 299 Ill. App. 3d at 234 (citing *People v. Allen*, 107 Ill. 2d 91 (1985)). Accordingly, we will not disturb the trial court's finding that respondent is a sexually dangerous

person unless the evidence relied upon by the trial court was so improbable as to raise a reasonable doubt. We find it was not.

Respondent's quarrel with the evidence below stems from the fact that a report relied upon by Dr. Carich was more than a year old at the time of his testimony. However, Carich stated he "continued to remain familiar with Mr. Burke's treatment" even after the report was compiled. Moreover, Carich discussed an interim evaluation completed approximately five months prior to his testimony. Nothing in the interim report changed Carich's assessment that respondent remained, and met all the criteria, of a sexually dangerous person.

Significant to Carich's conclusion that respondent remained sexually dangerous was respondent's refusal to characterize himself as a sex offender or acknowledge his offenses. Respondent's testimony at trial confirmed Carich's assessment of respondent. Moreover, respondent himself acknowledged that he had "not [made] very much" progress through his treatment.

While respondent claims this court held, in *People v. Whitney*, 33 Ill. App. 3d 729 (1975), that "it is wrong to base a determination of sexual dangerousness on findings that are more than a year old," *Whitney* is simply inapplicable to the case at bar. In *Whitney*, this court stated, "we believe it was not

proper for the trial judge to base his decision in part on a telephone conversation he held with another judge. Unlike other out-of-court conversations stipulated to by respondent, the advice of a judge from another county was not a part of the evidence before the court. Therefore, the evidence concerning adequacy of available protection for the public must also be reconsidered and a new finding of fact made by the trial judge. Since new findings are required, and since more than a year has elapsed since the hearing, we consider a new trial to be necessary." *Whitney*, 33 Ill. App. 3d at 734.

Respondent further contends that *People v. Austin*, 24 Ill. App. 3d 233 (1974), mandates we find the State's evidence of his sexual dangerousness lacking. *Austin*, however, involved an initial finding prior to commitment that respondent met the requirements of a sexually dangerous person. *Austin*, 24 Ill. App. 3d at 234. The case at bar involves an application of recovery filed under section 9 of the Act (725 ILCS 205/9 (West 2008)), and not an initial determination of dangerousness. When the State petitions for an initial determination and seeks commitment, section 4 of the Act mandates that two psychiatrists be appointed to examine respondent and their findings filed with the court. 725 ILCS 205/4 (West 2008). There is no such

requirement for an application of recovery.

In *Austin*, one of the psychiatrists filed his report after his initial examination of respondent but prior to a subsequent examination. *Austin*, 24 Ill. App. 3d at 109. The trial court allowed the doctor to testify to the subsequent examination which the appellate court found to be reversible error. *Austin*, 24 Ill. App. 3d at 109. Respondent claims *Austin* mandates we hold the trial court's judgment denying respondent's application was based upon improperly outdated evidence and, further, that allowing Carich to testify to matters that took place after the report constitutes reversible error.

Not only did respondent in the case at bar withdraw his request to have a subsequent and more current report compiled, but it was respondent who initially introduced evidence of the interim evaluation completed approximately five months before the trial. Given the fact that no categories of assessment were marked "poor" on the interim evaluation, we understand why respondent withdrew his request for a more current socio-psychiatric report and introduced evidence of the interim evaluation. However, even were we to hold that the trial court erred by failing to demand a report more current than the one dated March 25, 2008, it is well settled that a party cannot

inject error into proceedings and then receive a second trial based upon that error. *In re Detention of Swope*, 213 Ill. 2d 210 (2004); *People v. Williams*, 384 Ill. App. 3d 415 (2008). No subsequent report was compiled as respondent withdrew his request for one. Moreover, respondent introduced evidence of the interim evaluation knowing it contained information outside the March 25, 2008, report.

We find the evidence adduced at trial sufficient to support the trial court's finding that respondent is a sexually dangerous person beyond a reasonable doubt. Dr. Carich thoroughly discussed many criteria upon which he based his opinion that respondent is still sexually dangerous. After reviewing all the testimony, we cannot say the State failed to put forth sufficient testimony indicating that respondent is a sexually dangerous person beyond a reasonable doubt. We further find respondent is not entitled to relief based upon the trial court's failure to mandate a report more current than March 25, 2008. Finally, respondent is not entitled to relief based on the introduction of testimony containing information not discussed within that report.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court

of Iroquois County is affirmed.

Affirmed.